No. 94-461

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent's claims based on state contract and property law are preempted by the Interstate Commerce Commission's authorization of the abandonment of petitioner's rail line in accordance with the Interstate Commerce Act.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995)	10
Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983)	9
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*:	
450 U.S. 311 (1981)	7, 8, 9, 10
295 N.W.2d 467 (Iowa 1979)	8, 9
Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146 (1986), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989)	3
Hayfield Northern R. R. v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984)	4, 12
Pennsylvania R. R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915)	10

Statutes and regulation:

Hobbs Act, 28 U.S.C. 2344	5
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:	
49 U.S.C. 10101a	5
49 U.S.C. 10501(d)	1
49 U.S.C. 10505	2, 3
49 U.S.C. 10742	2
49 U.S.C. 10901(a)	2
49 U.S.C. 10903(a)	2
49 U.S.C. 10905(c)	4
49 U.S.C. 10906	4
49 U.S.C. 11101(a)	2

Statutes and regulation—Continued: Page

49 U.S.C. 11121(a) 2
49 U.S.C. 11705(b) 2
49 U.S.C. 11705(c) 2
49 C.F.R. 1152.50(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-464

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission (ICC) under the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.* The Commission's jurisdiction over interstate transportation by rail carriers is exclusive. 49 U.S.C. 10501(d). The Act sets forth the obligations of rail carriers, and it establishes a comprehensive mechanism for the enforcement of those obligations by the Commission. Specifically, the Act requires carriers to provide transportation upon

reasonable request, 49 U.S.C. 11101(a), as well as to furnish safe and adequate car service. 49 U.S.C. 11121(a). The Act also requires a rail carrier to provide reasonable, proper, and equal facilities for the interchange of traffic between its line and a connecting line. 49 U.S.C. 10742. Either the Commission or a federal district court may hold a railroad liable for damages sustained as a result of a carrier's breach of its common carrier obligations. 49 U.S.C. 11705(b) and (c).

The Act tempers those stringent obligations by allowing the Commission to relieve a railroad from all or part of its common carrier obligation to provide transportation. It also prevents state and local authorities from requiring railroads to institute service over interstate lines without ICC approval. Specifically, a railroad may abandon or discontinue the operation of an interstate line upon receiving a certificate from the Commission based on a finding that the public convenience and necessity require or permit such abandonment, 49 U.S.C. 10903(a), or upon receiving an exemption from the Commission from having to pursue formal abandonment procedures. 49 U.S.C. 10505. Moreover, a carrier may not operate over a railroad line in interstate commerce unless the Commission finds that the present or future public convenience and necessity require or permit operation of the line. 49 U.S.C. 10901(a).

2. Prior to February 24, 1992, petitioner Norfolk Southern operated a .13-mile section of rail line in downtown Charlotte, North Carolina, that had not carried local traffic for more than two years. See Pet. App. 16a, 20a. In 1990, the City of Charlotte contracted to purchase from Norfolk Southern the land on which that rail segment was located; the City

planned to construct a convention center on the property. *Id.* at 5a.[1] Norfolk Southern subsequently filed a notice of exemption to abandon the line segment in accordance with the Commission's out-of-service line class exemption from the formal abandonment requirements, 49 C.F.R. 1152.50(b).[2] See Pet. App. 5a, 16a. The exemption took effect on August 30, 1991. *Id.* at 17a, 20a.

On December 11, 1991, respondent North Carolina Railroad Company (NCRR) petitioned the ICC to revoke the exemption. Pet. App. 20a. NCRR owns a 316-mile rail line between Charlotte and Morehead City, North Carolina. *Id.* at 26a. Pursuant to a 99-year agreement executed in 1895, and subsequently amended by a 1968 lease (which was recorded in a 1969 Memorandum of Lease), NCRR leased to Norfolk Southern certain properties in downtown Charlotte. *Id.* at 5a, 23a. However, the lease was due to expire on December 31, 1994 (*id.* at 22a), and NCRR, seeking to preserve the option of connecting with Norfolk Southern in downtown Charlotte, asked the ICC to rescind the Norfolk Southern abandonment authority. *Id.* at 25a.

NCRR argued, *inter alia*, that the ICC proceedings should be reopened on the ground of changed circum-

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[1] Respondent's brief in opposition states that the section of rail line at issue in this case "has been torn out and the City has substantially completed construction of the new convention center." Br. in Opp. 7.

[2] The Commission had previously exempted such out-of-service lines from its formal abandonment procedures pursuant to 49 U.S.C. 10505. *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146, 150 (1986), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 124 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

stances. NCRR asserted that "[a]t the time of the filing of the Notice of Exemption, [the City of] Charlotte had committed itself to protect existing rail corridors." C.A. Rec. 75 (internal quotation marks omitted). NCRR further alleged that after the Commission's approval of the abandonment, the City had announced its intention to destroy the rail corridor "by tearing down the critical Stonewall Street Bridge." *Ibid.* Respondent acknowledged that "[o]rdinarily, what use is made of an abandoned right-of-way is of no concern to the Commission." *Ibid.* (citing *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984)). It contended, however, that in the present case "the commitment of Charlotte to protect the existing railroad corridors obviated the need for [NCRR], the State of North Carolina Department of Transportation or any other persons either to make an offer [to] purchase the property sought to be abandoned by [Norfolk Southern] or to seek a public use condition, allowing six-months' time to negotiate the right-of-way's acquisition." C.A. Rec. 75-76; see 49 U.S.C. 10905(c), 10906. As a result of the change in circumstances, NCRR argued, "the Commission should reopen the proceeding, nullify the exemption authorization and afford interested persons the opportunity to make an offer to purchase the property or to seek a public use condition, allowing six-month's [*sic*] time to negotiate the right-of-way's acquisition." C.A. Rec. 76.

The Commission denied NCRR's petition to revoke the exemption. Pet. App. 25a. Observing that NCRR and Norfolk Southern continue to connect at a second point north of Charlotte, the Commission found that future rail service was not jeopardized and that revocation of the exemption would be inconsistent with

the National Transportation Policy, 49 U.S.C. 10101a, which charges the Commission with promoting efficient and sound economic conditions in transportation and reducing regulatory barriers to exit. Pet. App. 25a. The Commission rejected NCRR's contention that changed circumstances necessitated reopening, concluding that NCRR had failed to demonstrate the existence of any "commitment by the City to preserve rail corridors." *Id.* at 24a. The Commission also stated that "neither [Norfolk Southern] nor the City assumed any obligation under the terms of the Memorandum of Lease, to maintain a connection with NCRR over the abandoned line. * * * NCRR's misinterpretation of the Memorandum of Lease does not provide a basis for establishing changed circumstances to reopen the proceeding." *Ibid.* The Commission's decision denying reconsideration was issued on February 18, 1992. *Id.* at 20a. NCRR did not appeal the ICC's decision, and the time to do so under the Hobbs Act, 28 U.S.C. 2344, has long since expired.

3. NCRR also filed a state court declaratory judgment action against Norfolk Southern and the City, asserting rights under state contract and property law. The complaint alleged, *inter alia*, that "NCRR has an easement implied by reservation based on pre-existing use over, across and through Lot A," Pet. App. 28a; that the real property in question was "encumbered by an equitable servitude in the nature of a railroad right of way so as to provide a continuous through connection between NCRR's line and [Norfolk Southern's] line," *id.* at 29a; that "NCRR has an implied contract with [Norfolk Southern] whereby [Norfolk Southern] agreed to maintain a continuous through track connection between NCRR's

line and [Norfolk Southern's] line," *id.* at 30a; and that "NCRR has an implied contract with the City of Charlotte whereby the City is required to maintain the existing railroad corridor or a like corridor," *ibid.* Norfolk Southern contended, *inter alia*, that the ICC had exclusive jurisdiction over NCRR's claims against Norfolk Southern. *Id.* at 6a. The trial court granted Norfolk Southern's motion for summary judgment with respect to four counts and denied it with respect to the four counts quoted above. *Id.* at 13a.[3]

Norfolk Southern appealed. The North Carolina Court of Appeals affirmed the trial court's denial of summary judgment with respect to the four counts that the trial court had allowed to go forward.[4] The court rejected Norfolk Southern's preemption argument, explaining that "[t]he cases which [Norfolk Southern] cites * * * are distinguishable from the facts in the instant case. The instant case turns on state law construction of written instruments, * * * while the I.C.C. ruling applied to the abandonment of the railroad. We therefore find that the trial court did not err in denying [Norfolk Southern's] motion to dismiss for lack of subject matter jurisdiction." Pet. App. 8a-9a. The court also held that for the

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[3] After the Commission issued its order denying reopening, Norfolk Southern moved in the trial court for leave to amend its answer to add a defense of collateral estoppel and/or res judicata. See C.A. Rec. 173-174. The trial court denied that motion without explanation. See Pet. App. 14a.

[4] NCRR cross-appealed, challenging the trial court's grant of summary judgment to Norfolk Southern with respect to the other four counts of the complaint. The North Carolina Court of Appeals dismissed the cross-appeal as interlocutory. See Pet. App. 9a-11a.

reasons set forth in its discussion of the federal pre-emption question, it "need not address" Norfolk Southern's putative collateral estoppel/res judicata defense. *Id.* at 9a. The Supreme Court of North Carolina denied further review. *Id.* at 1a-2a.

DISCUSSION

Petitioner does not purport to identify any conflict among the lower courts requiring resolution by this Court.[5] Rather, the thrust of its argument is that the instant case is squarely controlled by this Court's decision in *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). See, *e.g.*, Pet. 6-7. We disagree.

Certainly the principles announced in *Kalo Brick* are pertinent to the correct resolution of the pre-emption issues raised by respondent's suit. And we do not agree with the state court's suggestion that those principles are irrelevant simply because "[t]he instant case turns on state law construction of written instruments." Pet. App. 8a. *Kalo Brick* does not, however, hold that ICC approval of an abandonment precludes all state-law claims that are in any way related to the abandoned line or the real property on which it is located. Rather, a more nuanced inquiry is required, one that examines the nature of the asserted right and the scope of the requested remedy in order to determine whether adjudication of the state-law claim can be expected to impair the ICC's conduct of its regulatory mission. In the present case, we believe that the record in its current state is too fragmentary, and the analysis of the state court too cryptic, to facilitate review by this Court

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[5] Indeed, the petition cites no lower court cases at all, nor any decision of this Court issued after 1984. See Pet. IV-V (Table of Authorities).

at the present time. The petition for a writ of certiorari should therefore be denied.[6]

1. In *Kalo Brick*, the Court held that the ICC's approval of an abandonment precluded a subsequent damages action against the railroad for breach of a state-law "duty to furnish car service and transportation to all persons who apply." 450 U.S. at 323 (quoting *Kalo Brick & Tile Co.* v. *Chicago & N.W. Transp. Co.*, 295 N.W.2d 467, 469 (Iowa 1979)). The Court noted that "[t]he judgment as to what constitutes reasonableness belongs exclusively to the Commission," 450 U.S. at 325, and that "[a] system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.* at 326. See also *id.* at 331 ("a right to sue, with its implied threat of sanctions for failure to comply with what the courts of each State consider reasonable policies, is plainly contrary to the purposes of the Act").

Kalo Brick makes clear that the Commission's approval of an abandonment preempts any lawsuit based on a carrier's purported breach of a state-law duty to furnish reasonable service to the public generally. To allow such suits to go forward would permit state courts to revisit the very issues necessarily considered by the Commission in approving the abandonment. See 450 U.S. at 326 (noting that

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[6] A further consideration militating against review at this time is that Congress is currently embarked upon a major overhaul of the Interstate Commerce Act and the Interstate Commerce Commission. What effect this will have upon the continuing significance of the issues raised by the case at hand cannot be predicted at present.

plaintiff's state-law causes of action were "essentially attempts to litigate the issues underlying [the] abandonment of the * * * line"); *id.* at 331-332 ("We hold that the Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated carrier when the Interstate Commerce Commission, in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court."). As this Court recognized in *Kalo Brick*, such a regime would be entirely "at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.* at 326.[7]

2. Contrary to petitioner's submission, however, we believe that the present case is distinguishable from *Kalo Brick* in two significant respects.

NCRR does not assert that Norfolk Southern has breached a duty to provide rail service, either to itself or to the public at large; nor does it rely on

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[7] *Kalo Brick* also suggests that if the issues presented were otherwise suitable for immediate disposition by this Court, the current interlocutory posture of the case would not deprive the Court of jurisdiction under 28 U.S.C. 1257(a), which permits review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." *Kalo Brick* came to this Court in a procedural posture essentially identical to that presented here: an intermediate state court had held that the plaintiff's suit was not preempted and had remanded the case for trial, see *Kalo Brick & Tile Co.* v. *Chicago & N.W. Transp. Co.*, 295 N.W.2d 467, 469-472 (Iowa 1979), and the state supreme court had denied discretionary review. See 450 U.S. at 317. See also *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-498 n.5 (1983). Of course, to the extent that the current interlocutory posture renders the legal issues unclear or impedes this Court's ability to decide the case, it is obviously relevant to the decision whether to grant certiorari at this stage.

generalized notions of "reasonable service." It argues instead that Norfolk Southern has breached a non-rail-service obligation (grounded in state contract and property law), voluntarily assumed, to NCRR itself. In *Kalo Brick* the Court distinguished its prior decision in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), on the ground that in *Puritan* "the matters presented to the state courts for decision involved no questions of law or questions calling for an administrative judgment, and, in particular, no issue as to the reasonableness of the carrier's policies. * * * Instead, the state court was called upon to decide only the factual question whether the railroad had carried out the duties that it had agreed to undertake." 450 U.S. at 329. Cf. *American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817, 824 (1995) (although Airline Deregulation Act preempts enforcement of state regulatory requirements, it does not "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings").

This is not to say that state-law breach of contract actions can never be preempted by the Commission's authorization of an abandonment. If a state-law contract suit (whether seeking damages or specific performance) has the purpose or practical effect of compelling the resumption of railroad service over a line that the Commission has permitted to be abandoned, we believe that federal law prevents the action from going forward. We therefore do not agree with the North Carolina Court of Appeals' suggestion that the principles announced in *Kalo Brick* are irrelevant simply because "[t]he instant case turns on state law construction of written instruments." Pet. App. 8a.

In the present case, however, it is far from clear that NCRR's suit is properly characterized as a challenge to Norfolk Southern's abandonment of the line. Rather, NCRR's principal grievance appears to concern the construction of a convention center on the real property in question (which has destroyed the railroad corridor, making it unavailable for use in the future) rather than the cessation of railroad service or the dismantling of Norfolk Southern's tracks. Thus, NCRR states that it "initiated this proceeding to determine its contractual and property rights concerning the railroad right of way over the Subject Property." Br. in Opp. 14. Respondent states as well that it "has never asked the court to mandate a railroad service connection between Respondent's southern terminus and Petitioner's interstate line," *id.* at 12; that its "claims in this case do not concern provision of railroad service," *id.* at 17; and that it "does not seek any remedy inconsistent with the ICC's order allowing abandonment," *ibid.* Similarly in the court of appeals, NCRR asserted that

> contrary to [Norfolk Southern's] contentions, NCRR does not seek to reverse the ICC's approval of [Norfolk Southern's] abandonment. Rather, the only issues in this case are (a) what contractual obligations [Norfolk Southern] has to NCRR to preserve the real estate corridor and (b) what real property interests NCRR has in the corridor. These issues were not (and could not have been) part of the administrative proceedings before the ICC. What NCRR seeks is a declaration concerning connection of the rights of way and preservation of the physical integrity of the rights of way.

NCRR C.A. Br. 16. See also *id.* at 9 ("NCRR does not * * * construe [the 1968 lease] to require, or

attempt in this action to obtain, the use of [Norfolk Southern's] tracks. The 1968 Lease * * * simply describes the continuous real property corridor created by the connection of the [Norfolk Southern] and NCRR rights of way (i.e. the connection of two parcels of real property).").[8]

If NCRR's complaint is construed to challenge only the destruction of the railroad corridor, this case would appear to be governed primarily not by *Kalo Brick* but by *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), which holds that state law rules governing the use of real property *after* a railroad line has been abandoned are generally not preempted by federal law. The Court in *Hayfield* recognized that the relevant provisions of the Interstate Commerce Act "relate to requirements that must be met *before* the Commission will authorize an abandonment" and that "as a general matter, issuing a certificate of abandonment terminates the Commission's jurisdiction." 467 U.S. at 633. Moreover, if the North Carolina courts in this case ultimately were to enter a final judgment that petitioner believes to be inconsistent with the Commission's authorization of abandonment, this Court will of course be free to consider whether review is warranted at that time.

3. Petitioner acknowledges that "Commission authority over a carrier's right of way diminishes or

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[8] Before the Commission as well, NCRR focused on the destruction of the rail corridor (rather than on the cessation of railroad service or the dismantling of Norfolk Southern's tracks) and characterized its request for reopening as resting on an exception to the general principle that "[o]rdinarily, what use is made of an abandoned right-of-way is of no concern to the Commission." C.A. Rec. 75.

ceases after abandonment, and carriers might have post-abandonment contractual obligations and property rights that are justiciable as matters of ordinary contract and property law." Pet. 11. It asserts, however, that the present suit is as a practical matter "an attempt to have the North Carolina courts undo the Commission's authorization for petitioner's abandonment of its former track in Charlotte." Pet. 9. Respondent, for its part, takes pains to disavow any intent to challenge the abandonment of the line or to seek an order compelling the resumption of railroad service. See, *e.g.*, Br. in Opp. 12, 14, 17, 17-18. Thus, to a large extent the dispute between the parties centers not on the applicable legal principles but on the proper characterization of respondent's claims. This Court will be better able to assess the significance and proper resolution of the preemption question after the state courts have determined whether, and on what legal theory, respondent is entitled to relief. In light of the fragmentary record, the current interlocutory posture of the case, and the cursory treatment of the preemption question by the North Carolina Court of Appeals, we believe that review by the Court at the present time would be premature.[9]

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[9] This case is complicated somewhat by the fact that NCRR, while acknowledging that "[o]rdinarily, what use is made of an abandoned right-of-way is of no concern to the Commission," C.A. Rec. 75, argued that the ICC should reopen the abandonment proceedings based on the City's announced intention to destroy the railroad corridor after the abandonment had taken place. See pages 3-4, *supra*. In denying reopening, the Commission expressed disagreement with NCRR's construction of the 1968 lease and with NCRR's characterization of certain representations made by City officials. Pet. App. 23a-24a. Thus, although questions concerning

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

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the uses to which real property will be put after abandonment are not usually germane to the Commission's abandonment decision, the Commission in this case expressed a view with respect to some (though not all) of the arguments asserted by NCRR in the state court proceedings. In our view, the preclusive effect of that Commission pronouncement is best determined by reference to principles of res judicata and collateral estoppel rather than federal preemption. Cf. *Hayfield*, 467 U.S. at 636 n.15. After the Commission issued its order denying reopening, Norfolk Southern moved for leave to amend its answer to add a defense of collateral estoppel and/or res judicata, see C.A. Rec. 173-174; the trial court denied that motion without explanation, see Pet. App. 14a, and the North Carolina Court of Appeals held that it "need not address" the issue in light of its resolution of the preemption question. *Id.* at 9a; see Pet. 14 n.5. Although we have doubts as to the correctness of the state courts' holdings on this score, petitioner does not challenge those rulings in this Court, and we do not believe that the issue merits this Court's review in the present posture of the case.

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